(3)

No. 90-383

FILED

OCT 3

JOSEPH F. SPANIOL, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

SAM WHITFIELD, JR., LINDA WHITFIELD, P. L. PERKINS, JULIOUS MCGRUDER, GEORGIA M. VARNER, ANNIE SYKES, OLLIE JENNINGS, AND SAM BENNETT ..... *Petitioners*

vs.

BILL CLINTON, GOVERNOR OF ARKANSAS; W. J. MCCUEN, SECRETARY OF STATE OF ARKANSAS; THE PHILLIPS COUNTY BOARD OF ELECTION COMMISSIONERS; THE DEMOCRATIC PARTY OF ARKANSAS; THE DEMOCRATIC STATE COMMITTEE; AND THE PHILLIPS COUNTY DEMOCRATIC COMMITTEE .... *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

*STEVE CLARK
Attorney General

TIM HUMPHRIES, #84080
Assistant Attorney General
200 TOWER BUILDING
323 CENTER STREET
LITTLE ROCK, AR 72201
(501) 682-2007

BRUCE R. LINDSEY, #75078
2200 WORTHEN BANK BUILDING
200 WEST CAPITOL AVENUE
LITTLE ROCK, AR 72201-3699
Attorneys for Respondents
**Counsel of Record*

ARKANSAS LEGISLATIVE DIGEST, INC.

QUESTIONS PRESENTED

I.

WAS THE RUNOFF PRIMARY IN PHILLIPS COUNTY, ARKANSAS, IMPOSED OR APPLIED IN A MANNER WHICH RESULTED IN A DENIAL OR ABRIDGMENT OF THE RIGHT OF ANY CITIZEN TO VOTE ON ACCOUNT OF RACE OR COLOR IN THAT BLACK CITIZENS HAD LESS OPPORTUNITY THAN OTHER MEMBERS OF THE ELECTORATE TO PARTICIPATE IN THE POLITICAL PROCESS AND TO ELECT REPRESENTATIVES OF THEIR CHOICE IN VIOLATION OF THE VOTING RIGHTS ACT, 42 U.S.C. §1973?

II.

IS IT NECESSARY OR APPROPRIATE FOR THIS COURT TO CONSIDER WHETHER THE COURT BELOW ERRED IN ESTABLISHING A THRESHHOLD REQUIREMENT FOR MAINTENANCE OF A VOTING RIGHTS ACT CHALLENGE TO A PRIMARY RUNOFF ELECTION WHEN THE THRESHHOLD REQUIREMENT WAS MERELY AN ALTERNATE GROUND FOR DISMISSAL OF THE COMPLAINT?

III.

ARE STATE EXECUTIVE BRANCH OFFICIALS NECESSARY PARTIES IN A CHALLENGE TO RUNOFF PRIMARY ELECTIONS IN A SINGLE COUNTY WHERE THOSE STATE OFFICIALS MERELY PERFORM THE MINISTERIAL DUTY OF CERTIFYING THE ELECTIONS AND COUNTY PARTY OFFICIALS ACTUALLY IMPLEMENT THE LAWS IN QUESTION AND CARRY OUT THE ELECTION?

LIST OF PARTIES

The names of all the parties to the proceedings below appear in the caption.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

JURISDICTION OF THIS COURT 2

STATEMENT OF THE CASE 3
- Introduction 3
- Statement of Facts 4

REASONS WHY THE PETITION SHOULD BE DENIED 8
1. There is no conflict of decisions 9
2. The decision below is limited to the facts of this case and will have little effect beyond the instant case 14
3. The court lacks jurisdiction on the third issue presented by the petition 16

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES:

Butts v. City of New York, 779 F.2d 141 (2nd Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986) 28 U.S.C. §1254(1) 9

Cameron v. Hodges, 127 U.S. 322 (1888) 17

City of Port Arthur v. United States, 459 U.S. 159 (1982) 10

City of Richmond v. United States, 422 U.S. 358 (1975) 11

City of Rome v. United States, 446 U.S. 156 (1980) 10

Parker v. Ormsby, 141 U.S. 81 (1891) 17

Rogers v. Lodge, 458 U.S. 613 (1982) 13

Thornburg v. Gingles, 478 U.S. 25 (1986) 12

White v. Regester, 412 U.S. 755 (1973) 13

STATUTES:

A.C.A. §7-7-202 4

A.C.A. §7-5-310 6

A.C.A. §7-5-402 6

OTHER:

Wright & Miller, Federal Practice & Procedure, Vol. 16, Section 3949, Page 356 (1977) A.C.A. §7-5-106 16

No. 90-383

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

SAM WHITFIELD, JR., LINDA WHITFIELD, P. L. PERKINS, JULIOUS MCGRUDER, GEORGIA M. VARNER, ANNIE SYKES, OLLIE JENNINGS, AND SAM BENNETT ..... *Petitioners*

vs.

BILL CLINTON, GOVERNOR OF ARKANSAS; W. J. MCCUEN, SECRETARY OF STATE OF ARKANSAS; THE PHILLIPS COUNTY BOARD OF ELECTION COMMISSIONERS; THE DEMOCRATIC PARTY OF ARKANSAS; THE DEMOCRATIC STATE COMMITTEE; AND THE PHILLIPS COUNTY DEMOCRATIC COMMITTEE ..... *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Bill Clinton, Governor of Arkansas; W. J. McCuen, Secretary of State of Arkansas; the Phillips County Board of Election Commissioners; the Democratic Party of Arkansas; the Democratic State Committee; and the Phillips County Democratic Committee, respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Eighth Circuit's decision in this case

affirming the United States District Court for the Eastern District of Arkansas. The *en banc* opinion is reported at 902 F.2d 15. The opinion of the Eighth Circuit panel is reported at 890 F.2d 1423. The district court's opinion is reported at 686 F.2d 1365.

JURISDICTION OF THIS COURT

The *per curiam* opinion of the United States Court of Appeals for the Eighth Circuit upon rehearing *en banc*, summarily affirming the decision of the United States District Court for the Eastern District of Arkansas, was issued on May 4, 1990.

On July 26, 1990, Justice Blackmun entered an order extending the time for filing a petition for writ of certiorari to and including August 31, 1990.

This Court has jurisdiction under 28 U.S.C. §1254(1) on issues one and two in the petition. The Supreme Court lacks jurisdiction on the third issue, which involves whether the state defendants were correctly dismissed, because that issue was not timely appealed from the district court.

STATEMENT OF THE CASE

INTRODUCTION

The petitioners (plaintiffs below) are black citizens of Phillips County, Arkansas. Two of the petitioners (the Whitfields) were candidates for countywide executive branch offices in the 1986 and 1988 Democratic primary elections. The respondents are the Governor and the Secretary of State of the State of Arkansas, the State and Phillips County Democratic Parties, and the Phillips County Board of Election Commissioners.

Petitioners challenged the legality of Arkansas' majority vote requirement in party primary elections and in municipal and county general elections. The complaint contained two principal claims. First, petitioners asserted that the runoff laws, as applied in Phillips County, violated Section 2 of the Voting Rights Act. Second, they asserted that the majority vote laws were enacted and had been maintained by the Arkansas Legislature with a racially discriminatory purpose in violation of the 14th and 15th Amendments of the United States Constitution.

Prior to trial, the district court dismissed the complaint with regard to the general election runoff statute because the plaintiffs failed to serve the complaint on the members of the Phillips County Election Commission, who were, the court held, indispensible parties. Additionally, the court grounded its dismissal of the general election runoff claim on the fact that no black candidate had in fact lost a general election in a runoff.

Also prior to trial, the court granted summary judgments in favor of the Governor and the Secretary of State because

they were not necessary parties and no claim of wrongdoing had been asserted against those defendants.

After a four-day trial, the court dismissed all remaining claims.

A panel of the Eighth Circuit Court of Appeals affirmed the district court's judgment as to the constitutional claim, holding that the majority vote requirement was not enacted or maintained with a discriminatory purpose. That holding is not at issue here. The panel reversed the district court's judgment on the Section 2 claim. On reconsideration *en banc*, an evenly divided Eighth Circuit affirmed the district court's judgment on both claims.

Statement of Facts

The statutes which are the subject of this petition are A.C.A. §7-7-202 which provides for a runoff primary election if no candidate wins a majority in the first party primary, and A.C.A. §7-5-106 which provides for a runoff when candidates for municipal or county office fail to receive a majority of the votes cast in a general election. These statutes apply to all such elections statewide.

According to the 1980 Census, the population of Arkansas was approximately 16.3 percent black. About 47 of the 75 counties in Arkansas had black populations below the statewide percentage, and 21 counties were less than 1 percent black. Twenty-two counties had a black population over 25 percent. The total population of Phillips County was 35,772, approximately 53 percent black, and approximately 47 percent of the voting-age population was black.

Two of the petitioners, Sam and Linda Whitfield ran in

the 1986 and 1988 Democratic primaries, Mr. Whitfield for the office of County Judge and Ms. Whitfield for the office of Circuit Clerk. The County Judge is the chief executive officer in county government, and the Circuit Clerk is the clerk of the county's circuit court, which has criminal and civil jurisdiction. Both are single-member, executive offices. Each of the Whitfields faced two white candidates in each of these elections. In each of their first primaries, the Whitfields finished first, with percentages in the mid-30s. Each of the Whitfields lost their subsequent runoff elections.

As the district court found, there have been no legal barriers in Arkansas to black citizens' participation in the political process since at least 1965 when the poll tax was repealed by popular vote in a statewide referendum. Particularly with regard to Phillips County, the County Clerk, who is the chief deputy registrar, has made a great effort to register blacks, having appointed approximately 40 volunteer deputy registrars by the time at trial, approximately 80 percent of whom were black. Those deputies registered mostly black voters. Volunteer deputy registrars are empowered to register voters anywhere in the county at any time without restriction.

The district court found that black voters in Phillips County do not face harassment or intimidation in registering, or voting, or in running for office. Some polling places have been moved in predominantly black precincts as they have in predominantly white precincts, because the polling places are not permanent. The location of polling places or their movement does not constitute a significant barrier to black or white participation in Phillips County, though, the district court found. Black leadership in Phillips County is highly organized and motivated during elections and provides

transportation for black voters who request such assistance. The district court found that the laws relating to the assistance of persons at the polling booths have been liberalized so that a voter who cannot read or is otherwise disabled may be assisted by a person the voter selects. A.C.A. §7-5-310. Any voter who cannot attend the polls on election day may vote absentee. A.C.A. §7-5-402. (See, generally, 87a-89a).

The party primary runoff, which was the subject of the trial in this case, resulted from a popularly enacted amendment to the State Constitution in 1938. The issue of runoffs first came into focus in the mid-1920s when the proponents of the majority vote requirement argued for its use as a method to thwart the rise of the Ku Klux Klan as a political force in Arkansas. Then, in 1928, Harvey Parnell won the Democratic gubernatorial primary over Brooks Hayes and a field of five other candidates with a 42 percent plurality. In 1933, the legislature passed a runoff bill, which it repealed in 1935. Then, in 1936, Carl E. Bailey polled just 35 percent of the vote in a five-candidate primary field to win the governorship. To insulate the runoff requirement from further legislative tampering, the *people* in 1938 enacted Amendment 29 to the Arkansas Constitution, which provided for runoffs. Throughout this period, blacks could not legally vote in the Democratic Primary. Also throughout this period (and in Phillips County now) the nomination in the Democratic Primary was tantamount to election since there was no Republican opposition.

Both of the state statutes in question here apply statewide. County judges, sheriffs, county clerks, county treasurers, circuit clerks, justices of the peace (7 to 13 in each county, forming the county's legislative branch, the quorum court), circuit and chancery judges, representatives, senators,

aldermen, mayors, and other officials are all nominated in partisan primaries or elected in non-partisan municipal elections subject to the runoff requirement throughout the state. In effect, thousands of offices every two years are subject to the majority vote requirement, and most of these races occur in jurisdictions where blacks form an insignificant portion of the population, since the vast majority of these jurisdictions are virtually all white. The state does not require a runoff after the general elections for some offices, primarily statewide offices. However, plaintiffs were unable to point out a single election in which a third party candidate in such an election was able to capture enough votes in the general election so that the winner received less than a majority because, indeed, this has never happened.

REASONS WHY THE PETITION SHOULD BE DENIED

The Voting Rights Act serves the laudable purpose of protecting citizens from governmental actions and structures which impede their ability to "participate in the political process and to elect representatives of their choice" on an equal basis. It is a remedial statute, the goal of which is to identify the standards, practices and procedures for voting which, inter alia, result in discrimination against minority groups.

Petitioners here propose a cynical perversion of that fundamental purpose. They want this court to allow losing political candidates to reverse the results of non-discriminatory elections by making post hoc changes in fundamental and traditional election rules. The result petitioners seek in this case is to have two sets of rules for elections in Arkansas. One set of rules would allow runoffs in elections involving three white candidates, or three black candidates, or two black candidates and one white candidate in a majority black subdistrict, or three-candidate races in which a black candidate finishes second and is enabled, by virtue of the runoff, to have a second chance to win. Petitioners want another set of rules for elections in which two white candidates and one black candidate run, and the black candidate gains a plurality. The Voting Rights Act does not countenance such a perversion of the election process. The Voting Rights Act properly applies to cases involving the dilution of a minority's voting strength through discriminatory districting schemes and to cases challenging alleged structural impediments to registration or voting or other forms of participation in the electoral process. This is obviously not such a case. This case involves only those four races in which two of the plaintiffs ran and finished first in three-candidate primaries with plurality percentages in the

mid-30s. The district court correctly found that in those four races the Voting Rights Act was not implicated and the Eighth Circuit correctly affirmed. For these reasons, and those stated below, review by this Court is neither necessary nor appropriate.

I.

THERE IS NO CONFLICT OF DECISIONS.

The first issue presented in this petition is whether the runoff primary in Phillips County, Arkansas was imposed or applied in a manner which resulted in a denial or abridgment of the right of any citizen to vote on account of race or color in that blacks had less opportunity than whites to participate in the political process and to elect representatives of their choice. The only other circuit to have considered this issue reached the same conclusion as the Eighth Circuit. In *Butts v. City of New York*, 779 F.2d 141 (2nd Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986), the court reviewed a New York law under which candidates for certain offices must receive 40 percent or more of the votes cast in a party primary election to avoid a runoff. As in the instant case, the challenged runoff requirement in Butts involved executive offices held by one person. In analyzing the situation before it, the Second Circuit noted:

> There are two basic ways in which members of a class of citizens may have "less opportunity . . . to participate in the electoral process." There may either be restrictive practices that deter members of the class for voting, or electoral arrangements that diminish a class's opportunity to elect representatives in proportion to its numbers. Although the Act makes clear that a class

> has no right to elect its members by numerical proportion, the class does have the right to an opportunity, equal to that of other classes, to obtain such representation.

Id. at 148.

The court noted various methods of denying such opportunity, such as creating electoral districts with small minority populations, class-based gerrymandering, splitting minority areas into two or more electoral districts, and at-large elections. The court also recognized that "a runoff requirement can exacerbate the unfair effect of at-large elections for a multi-member body, and has been invalidated in that context." *Id.*, citing *City of Rome v. United States*, 446 U.S. 156 (1980). The court went on to hold that:

> We cannot . . . take the concept of a class's impaired opportunity for equal representation and uncritically transfer it from the context of elections for multi-member bodies to that of election for single member offices. There can be no equal opportunity for representation within an office filled by one person. Whereas in an election to a multi-member body, a minority class has an opportunity to secure a share of representation equal to that of other classes by electing its members from districts in which it is dominant, there is no such thing as a "share" of a single member office. The distinction is implicit in *City of Port Arthur v. United States*, 459 U.S. 159 (1982), where the court struck down a runoff requirement that Port Arthur had appended to its at-large voting system for seats on the multi-member city council, but made no mention of a similar runoff requirement for the election of mayor. The latter runoff was not even challenged.

Id. at 148-149.

The Second Circuit went on to note that ". . . so long as the winner of an election for a single member office is chosen directly by the votes of all eligible voters, it is unlikely that electoral arrangements for such an election can deny a class equal opportunity for representation." *Id.* at 149. The reasoning of the Second Circuit was, then, that the Voting Rights Act recognized implicitly certain fundamental electoral precepts which were ingrained in our democracy. One of those, as the court recognized, is

> The rule in elections for single member offices . . . that the candidate with the most votes wins, and nothing in the Act alters this basic political principle. Nor does the Act prevent any governmental unit from deciding that the winner must have not merely a plurality of the votes, but an absolute majority . . . or at least a substantial plurality, such as a 40 percent level required by [New York law].

Id. Even the dissenting judge in *Butts* agreed with this rationale with regard to open primaries, such as are practiced in Arkansas. *Id.* at 155. The runoff law in New York did not trigger Section 2 analysis because it:

> Merely provides that the nominees for three city offices traditionally elected by majority or large plurality actually represent the views of a majority or a large plurality of their parties' voters. It is possible that the runoff law may make it harder for the preferred candidate of a racial minority — or ideological minority — to win a party's nomination, but, as we have noted, the Act is concerned with a dilution of minority participation and not the difficulty of minority victory. [citing *City of Richmond v. United States*, 422 U.S. 358 (1975).]

Id.

The district court here found that the runoff requirement, itself, did not dilute minority participation. Just as the *Butts* court made its decision based on a functional analysis of the runoff requirement, so did the district court here. The function of the runoff requirement, the district court held, is simply to see that officials who are traditionally elected by the majority of votes in most jurisdictions are elected by the majority of votes in a one-party jurisdiction such as Phillips County. That is the function of the runoff requirement that is a result of the runoff requirement. The traditional and universally accepted notion that the winning candidate should be the one who can procure the votes of the majority of those who care to get out and vote is not subject to attack under the circumstances in both cases. Just as petitioners would not be able to have the most vote requirement changed, they cannot have a majority vote requirement eliminated. As the district court stated, "we are dealing here with the very heart of our political system." (127a)

This case, like *Butts*, was correctly decided. There is no split in the circuits. Review by this court is neither necessary nor appropriate.

The second issue raised in the petition is whether the district court could establish a threshhold test for Section 2 cases involving runoff elections that such suits could not be brought if the black voting age population of the contested area is practically equal to the white voting age population. Petitioners assert this ruling conflicts with decisions of this court, as well as of other circuits. This argument totally lacks merit. Indeed, the opinion of this court which petitioners cite as having rejected such tests actually *established* a three-part threshhold test for maintaining Voting Rights Act suits in multi-member district cases. *See Thornburg v. Gingles*, 478

U.S. 25 (1986). The other Supreme Court cases cited by petitioners, *White v. Regester*, 412 U.S. 755 (1973), and *Rogers v. Lodge*, 458 U.S. 613 (1982), did not deal with majority vote requirements, but, instead, concerned at-large election issues. The same is true for the Fifth and Eleventh Circuit cases cited by petitioners.

In *Gingles*, this Court noted that Voting Rights Act challenges to different types of election practices will require the application of different tests. Referring to the Senate Report factors used by the courts in assessing at-large election cases, the court stated:

> While the enumerated factors will often be pertinent to *certain types* of Section 2 violations, *particularly to vote dilution claims*, other factors may also be relevant and may be considered.

Id. at 45. Just as the *Gingles* threshhold requirements for maintaining a multi-member district case is particularly tailored to its subject matter, so will the tests to be employed to measure Voting Rights Act violations in other contexts be specifically tailored to their subject matter.

Finally, the third issue raised in the petition asks whether the Governor and Secretary of State are necessary parties to bring a challenge of a runoff requirement when those individuals perform merely ministerial functions. Petitioners cite numerous cases where such governmental officials were parties, but do not cite any authority, because there isn't any, to the effect that such governmental officials are necessary parties. Even if this court had jurisdiction over this claim, it should not grant the petition because plaintiffs could have maintained the action simply by serving notice on those local election officials who actually ran the elections in question and

were closest to the facts of the action. Just because other cases, in which this issue was never raised, have been maintained with state officials as parties does not mean that the district court's refusal to allow such an action conflicts with any decisions of this court or another.

II.

THE DECISION BELOW IS LIMITED TO THE FACTS OF THIS CASE AND WILL HAVE LITTLE EFFECT BEYOND THE INSTANT CASE.

The laudable purposes of the Voting Rights Act have been well served in the area of eliminating discriminatory at-large elections and multi-member districting schemes. Scores, perhaps hundreds, of cases have resulted in the creation of single member districting schemes for legislative bodies at every level of government. Because of the existence of the Voting Rights Act, it is safe to say that hundreds, perhaps thousands, of black elected government officials run for office in majority black districts. It should be pointed out that this result has been achieved not just through litigation, but through structural changes which have occurred in the political process as well.

Petitioners are presumably not challenging the existence of runoffs in predominantly black districts or subdistricts where black preferred candidates would be hurt rather than helped by the elimination of the runoff. Presumably, petitioners do not challenge the runoff requirement in any race where a black candidate would not be potentially harmed by the runoff — that is, races in which a black candidate runs against two white candidates and receives a plurality of the vote. By dropping their constitutional and statewide claims,

petitioners clearly are seeking relief only in the narrowly limited set of circumstances in which black candidates would be helped by the elimination of the runoff.

Given those circumstances, the effects of a ruling favorable to petitioners would be extremely limited. Indeed, a ruling in their favor probably wouldn't even help petitioners because there is no guarantee that the white community would not coalesce around one white candidate, or that the white community would not gravitate to the Republican Party to create general election challenges to defeat minority candidates in the absence of the runoff requirement. Indeed, even if it could be held that the runoff requirement violated the Voting Rights Act in this case, there could be no remedy consistent with the democratic election process which would even come close to assuring blacks success at the polls. The existence of an adequate remedy is a prerequisite to finding a violation of the Voting Rights Act. *See Gingles, supra.* In *Gingles,* the test for a violation was determined by reference to an established norm — single member districts. Here, the established norm *is* the runoff requirement. Any test for a violation that the court would establish in this case, then, would be strictly limited to the factual circumstances that exist in this case and would affect few, if any, others than the litigants herein.

It should be noted that petitioners apparently agree that this case is fact-bound and limited to a narrow issue. In their response to respondents' "Petition for Rehearing and Rehearing En Banc" in the Eighth Circuit, petitioners argued that the issue in this case is not "a question of exceptional importance." Petitioners further asserted that challenges to runoff elections must be analyzed "in light of the distinctive facts and unique political conditions they present." That being

the case, it cannot be successfully argued here that the issue merits review by this court.

III.

THE COURT LACKS JURISDICTION ON THE THIRD ISSUE PRESENTED BY THE PETITION.

The third issue presented by the petition is whether the district court correctly granted summary judgment in favor of the Governor and Secretary of State on the grounds that they weren't necessary parties when the county officials who actually implement the laws in question and carry out the elections in question were not served with the complaint.

This issue was never the subject of an appeal to the Eighth Circuit Court of Appeals and it is not, therefore, appropriate for this Court to review it. In their notice of appeal from the district court to the Eighth Circuit, petitioners gave notice that they appealed only "from the final judgment of the district court entered in this action on the 20th of May, 1988." The judgment rendered May 20, 1988 is specifically limited to the issues which were tried and the findings of fact, conclusions of law set forth in the district court's memorandum opinion. (58a-132a) The district court granted the summary judgment in favor of the Governor and the Secretary of State in an Order dated March 4, 1988. (132a-133a) Clearly, petitioners were not appealing the order of March 4, 1988 in which the court granted the summary judgment. The appellate court may not infer that the notice of appeal included the March 4th Order since it did not specifically so state. See, generally, *Wright & Miller, Federal Practice & Procedure,* Vol. 16, Section 3949, Page 356 (1977). It is equally clear that the Eighth Circuit did not consider this

issue to be before it since neither the panel, nor the court *en banc* commented on the issue. Since the Court of Appeals is precluded from reaching this issue, this Court would likewise be prevented from resolving the merits upon grant of certiorari. In order for this Court to exercise jurisdiction under 28 U.S.C. §1254, a case must be "in" the Court of Appeals. Since the Court of Appeals did not have jurisdiction on this question, the case is not properly "in" the Court of Appeals and the issue cannot thus be decided here. *Cameron v. Hodges*, 127 U.S. 322 (1888); *Parker v. Ormsby*, 141 U.S. 81 (1891).

CONCLUSION

For the reasons stated above, and for the reasons stated by the district court in its opinion, this Court should deny the petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

*STEVE CLARK
Attorney General
200 TOWER BUILDING
323 CENTER STREET
LITTLE ROCK, AR 72201
(501) 682-2007

TIM HUMPHRIES, #84080
Assistant Attorney General
200 TOWER BUILDING
323 CENTER STREET
LITTLE ROCK, AR 72201
(501) 682-2007

BRUCE R. LINDSEY, #75078
2200 WORTHEN BANK BUILDING
200 WEST CAPITOL AVENUE
LITTLE ROCK, AR 72201-3699
Attorneys for Respondents

**Counsel of Record*